113-199

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 873.

THE NORTHERN LIBERTY MARKET COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN R. KELLY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JULY 2, 1884.

and invested the latter with whatever title the Act of 14th of February, 1874, gave the former.

The mortgage in the granting clause uses the words "*Grant, Bargain and Sell.*" It was made under the statute of 1804.

The deed from Moses Austin to Bryan and the Pettibones was under the statutes of the then Territory of Missouri, in force when it was made, A GENERAL WARRANTY DEED, save as against certain conveyances specially excepted, and against the mortgage in favor of the Bank of St. Louis and the judgments against Austin in favor of the Bank and of McNair. It also contained the statutory words, 'GRANT, BARGAIN AND SELL,' which under the law then in force, passed 1st of Oct., 1804 (see 1 Laws Louisiana Territory, pp. 7 and 8) "shall be adjudged an express covenant to the grantee, his heirs and assigns, to-wit: That the grantor was seized of an indefeisable estate in fee simple, freed from incumbrances done or suffered from the grantor (except the rents and services that may be reserved), as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed, and that the grantee, his heirs, executors, administrators and assigns, may, in any action, assign breaches as if such covenant were expressly inserted."

See also Geyer's Digest, Laws of Mo., p. 127.

Hence both instruments or either of them conveyed not only the existing title or equity of Austin, but any title that he, or his heirs through him, might thereafter acquire to the league square, known as the Mine a Breton survey.

Irrespective therefore of the question whether the Act of 1874 does not protect a claim based on long possession, irrespective of any defects, fatal or otherwise in the Sheriff's deeds, irrespective even of any question of the validity of the decree in the equity suit, it is clear that on no tenable theory can the plaintiffs in error recover.

Respectfully Submitted.

GEO. D. REYNOLDS,

of Counsel for Defendants in error.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Declaration, Rule to Plead, &c. Filed April 4th,* 1884.

In the Supreme Court of the District of Columbia.

THE NORTHERN LIBERTY MARKET COMPANY, Pl'ff, } At Law.
vs. } No. 25224.
JOHN R. KELLY, Defendant. }

1. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, sues the defendant, for that the defendant, on the first day of January, 1875, by his promissory note, now overdue, promised to pay to the plaintiff or order $171.05, fifty-two months after date, with interest at the rate of eight per cent. per annum, but did not pay the same.

2. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, sues the defendant for that the defendant, on the 1st day of January,
2 1875, by his certain other promissory note, now overdue, promised to pay to the plaintiff or order $171.05, fifty-two months after date, with interest at the rate of eight per cent. per annum, but did not pay the same.

3. The plaintiff, a body corporate, duly incorporated under the general corporation act in force in the District of Columbia, sues the defendant, for that the defendant, on the 1st day of January, 1875, by his certain other promissory note, now overdue, promised to pay to the plaintiff or order $171.05, fifty-eight months after date, with interest at the rate of eight per cent. per annum, but did not pay the same.

4. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, sues the defendant, for that the defendant, on the first day of January, 1875, by his certain other note, now overdue, promised to pay to the plaintiff or order $171.05, fifty-eight months after date, with interest at the rate of eight per cent. per annnm, but did not pay the same.

5. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Colum-
3 bia, sues the defendant, for that the defendant, on the first day of Januery, 1875, by his certain other promissory note, now ovedue, promised to pay to the plaintiff or order $171.05, sixty-four months after date, with interest at the rate of eight per cent. per annum, but did not pay the same.

6. The plaintiff, a body corporate, duly incorporated under the general incorporation act if force in the District of Columbia, sues the defendant, for that the defendant, on the 1st day of January, 1875, by his certain other promissory note, now overdue, promised to pay to the plaintiff or order $171.05, sixty-four months after date, with interest at the rate of eight per cent. per annum, but did not pay the same.

7. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, sues the defendant, for that the defendant, on the 1st of January, 1875,

by his certain other promissory note, now overdue, promised to pay to the plaintiff or order $171.05, seventy months after
4 date, with interest at the rate of eight per cent. per annum, but did not pay the same.

8. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, sues the defendant, for that the defendant, on the 1st day of January, 1875, by his certain other promissory note, now overdue, promised to pay to the plaintiff or order $171.05, seventy months after date, with interest at the rate of eight per cent. per annum, but did not pay the same.

9. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, sues the defendant, for that the defendant, on the 1st day of January, 1875, by his certain other promissory note, now overdue, promised to pay to the plaintiff or order $171.05, seventy-six months after date, with interest at the rate of eight per cent. per annum, but did not pay the same.

10. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia,
5 sues the defendant, for that the defendant, on the 1st day of January, 1875, by his certain other promissory note, now overdue, promised to pay to the plaintiff or order $171.05, seventy-six months after date, with interest at the rate of eight per cent. per annum, but did not pay the same.

11. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, sues the defendant, for that the defendant, on the 1st day of January, 1875, by his certain other promissory note, now overdue, promised to pay to the plaintiff or order $171.05 eighty-two months after date, with interest at the rate of eight per cent. per annum, but did not pay the same.

12. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, sues the defendant, for that the defendant, on the 1st day of January, 1875, by his certain other promissory note, now overdue, promised to pay to the plaintiff or order $171.05 eighty-two months after date, with interest at the rate of eight per cent. per annum,
6 but did not pay the same.

13. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, sues the defendant, for that the defendant, on the 1st day of January, 1875, by his certain other promissory note, now overdue, promised to pay to the plaintiff or order $171.58 eighty-eight months after date, with interest at the rate of eight per cent. per annum, but did not pay the same.

14. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, sues the defendant, for that the defendant, on the 1st day of January, 1875, by his certain other promissory note, now overdue, promised to pay to the plaintiff or order $171.05 eighty-eight months after

date, with interest at the rate of eight per cent. per annum, but did not pay the same.

15. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, sues the defendant, for that the defendant, on the 1st day of Jan-
7 uary, 1875, by his certain other promissory note, now overdue, promised to pay to the plaintiff or order $171.05 ninety-four months after date, with interest at the rate of eight per cent. per annum, but did not pay the same.

16. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, sues the defendant, for that the defendant, on the 1st day of January, 1875, by his certain other promissory note, now overdue, promised to pay to the plaintiff or order $171.05, ninety-four months after date, with interest at the rate of eight per cent. per annum, but did not pay the same.

17. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the Distrits of Columbia, sues the defendant, for that the defendant, on the 1st day of January, 1875, by his certain other promissory note, now overdue, promised to pay to the plaintiff or order $171.05, one hundred months after date, with interest at the rate of eight per cent. per annum, but did not pay the same.

8 18. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, sues the defendant, for that the defendant, on the 1st day of January, 1875, by his certain other promissory note, now overdue, promised to pay to the plaintiff or order $171.05, one hundred months after date, with interest at the rate of eight per cent. per annum, but did not pay the same.

19. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, sues the defendant, for that the defendant, on the 1st day of January, 1875, by his certain other promissory note, now overdue, promised to pay to the plaintiff or order $171.05, one hundred and six months after date, with interest at the rate of eight per cent. per annum, but did not pay the same.

20. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, sues the defendant, for that the defendant, on the 1st day of Jan-
9 uary, 1875, by his certain other promissory note, now overdue, promised to pay to the plaintiff or order $171.05, one hundred and six months after date, with interest at the rate of eight per cent. per annum, but did not pay the same.

21. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, sues the defendant, for that the defendant, on the 5th day of August, 1881, by his promissory note, now overdue, promised to pay to the order of the plaintiff $1,881.60, with interest at six per cent. per annum, ninety days after date, but did not pay the same.

22. The plaintiff, a body corporate, duly incorporated under the

general incorporation act in force in the District of Columbia, sues the defendant, for that heretofore, to wit, on the 11th day of November, 1881, one William S. Crown, by his promissory note, now overdue, signed with his name of W. S. Crown, promised to pay to the plaintiff or order $394.08, sixty days after date, with interest at six per cent. per annum; and the said defendant, for a valuable consideration, guaranteed the payment of the said promissory note, yet neither the said William S. Crown, nor the said defendant, has paid the same.

23. The plaintiff, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, sues the defendant for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, and for work done and materials provided by the plaintiff for the defendant at his own request, and for money lent by the plaintiff to the defendant, and for money received by the defendant for the use of the plaintiff, and for money paid by the plaintiff for the defendant at his own request, and for money found to be due from the defendant to the plaintiff upon accounts stated between them.

And the plaintiff claims $3,815.61, with interest on $3,421.53 thereof from the 1st day of January, 1875, at the rate of eight per cent. per annum, and on the remaining $394.08 thereof from the 11th day of November, 1881, at the rate of six per cent. per annum, besides the costs of this suit.

J. J. DARLINGTON AND
R. T. MERRICK,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court, occurring twenty days after service hereof, otherwise judgment.

J. J. DARLINGTON,
R. T. MERRICK,
Att'ys for Plaintiff.

Summons. Issued April 4th, 1884.

In the Supreme Court of the District of Columbia, the 4th day of April, 1884.

THE NORTHERN LIBERTY MARKET COMPANY, Pl'ff,
vs.
JOHN R. KELLY, Def't.
At Law. No. 25224.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on the first day of its first special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.
[SEAL.]

R. J. MEIGS, *Clerk.*
By J. R. YOUNG,
Ass't Clerk.

NOTE.—The special terms of the court commence on the first Tuesday of every month, except August, in which month there is no term of the court.

On Back.

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant the 5th day of April, 1884.

CLAYTON McMICHAEL,
Marshal.

Defendant's Pleas. Filed April 16th, 1884.

In the Supreme Court of the District of Columbia.

THE NORTHERN LIBERTY MARKET COMPANY, Pl'ff, *vs.* JOHN R. KELLY, Def't. } At law. No. 25,224.

The defendant says that he is not indebted as alleged.

13 And for a further plea, the defendant says that he never promised as alleged.

The defendant further says that the plaintiff ought not to have and maintain his aforesaid action, because there was no consideration for the giving of the several notes in the said declaration mentioned, or either of them.

The defendant further says that the plaintiff ought not to have and maintain his aforesaid action, because the said notes were given as and for a part of the consideration for the granting by the plaintiff of a lease to the defendant of one of the stalls of the plaintiff in the plaintiff's market-house for the term of ninety-nine years, renewable forever.

And the defendant says that in fact the plaintiff was, in the year 1874, created a corporation to continue for the limited term of twenty years only, and that the said supposed contract whereby the plaintiff undertook to grant a lease of the said stall for market use and purposes for ninety-nine years was in excess of the power con-

14 ferred upon the plaintiff by its charter or act of incorporation, and therefore void; and that the consideration for which the said notes were supposed and intended to be given did not exist, and have wholly failed, by reason whereof the said note is void.

And for a further plea, the defendant says that the notes mentioned and set forth in the twenty-first count of the said declaration was given by this defendant and accepted by the plaintiff in the place of the said promissory notes set forth in the first twenty counts of the said declaration, and there was no new or other consideration for the said notes in the said twenty-first count mentioned.

And for a further plea the defendant says that he never guaran-

teed the notes of the said W. S. Crown, as alleged in the twenty-second count of the said declaration.

JAS. G. PAYNE,
Att'y for Defendant.

Replication & Joinder in Issue. Filed April 17th, 1884.

15 In the Supreme Court of the District of Columbia.

THE NORTHERN LIBERTY MARKET COMPANY, Pl'ff, } At Law.
vs. } No. 25224.
JOHN R. KELLY, Def't. }

Replication of Plaintiff & Joinder in Issue.

1. The plaintiff joins issue upon the defendant's first plea.
2. The plaintiff joins issue upon the defendant's second plea.
3. The plaintiff joins issue upon the defendant's third plea.
4. The plaintiff joins issue upon the defendant's fourth plea so far as the same applies to the first twenty counts and the twenty-third count of the plaintiff's declaration.
5. For replication to the defendant's fourth plea, in so far as the same applies to the twenty-first count of the declaration, the plaintiff says that the defendant, well knowing each and every of the matters of fact averred in the said fourth plea, executed and delivered to the plaintiff the promissory note described in the said
16 twenty-first count, in compromise of a much larger sum, claimed by and due to the plaintiff from the defendant, under the contract of said defendant with the plaintiff for the lease mentioned in said fourth plea.

6. And for replication to the defendant's said fourth plea, in so far as the same applies to the twenty-second count of the declaration, the plaintiff says that the defendant guaranteed the payment of the promissory notes in said count described, as therein alleged, well knowing each and every of the matters of fact in the said plea averred, and that the said promissory notes *was* given by the maker thereof to the plaintiff, with like knowledge of the said facts, in compromise of a much larger sum of money, claimed by and due to the plaintiff from said maker, under a contract of the said maker with the plaintiff for lease of a stall in said plaintiff's market-house, similar to the lease mentioned in said fourth plea.

For replication to the defendant's fifth plea, the plaintiff says that the promissory notes mentioned in the twenty-first count of
17 the declaration *was* given by the defendant, and accepted by the plaintiff, in compromise of the promissory notes described in the first twenty counts of said declaration, upon express terms that the said notes should not be a settlement or compromise of the said earlier notes, unless the said note was paid at maturity, and that it remains wholly unpaid.

R. T. MERRICK,
J. J. DARLINGTON,
Att'ys for Plaintiff.

Defendant's Joinder of Issue. Filed April 17th, 1884.

In the Supreme Court of the District of Columbia.

THE NORTHERN LIBERTY MARKET COMPANY
vs.
JOHN R. KELLY. } At Law. No. 25224.

The defendant joins issue with the plaintiff on the plaintiff's replications to the defendant's fourth and fifth pleas.

JAMES G. PAYNE,
Att'y for Defendant.

18 *Agreed Statement of Facts. Filed April 19th*, 1884.

In the Supreme Court of the District of Columbia.

THE NORTHERN LIBERTY MARKET COMPANY,
Pl'ff,
vs.
JOHN R. KELLY, Def't. } At Law. No. 25224.

Agreed Statement of Facts.

The plaintiff and defendant, by leave of the court first had and obtained, submit the above-entitled cause for the opinion of the court upon the following agreed statement of facts or special case.

1. The plaintiff is, and since the 18th day of May, A. D. 1874, has been, a body corporate, duly incorporated under the general incorporation act in force in the District of Columbia, approved May 5th, 1870.

2. In the month of January, 1875, the plaintiff, being the owner in fee-simple of the westernmost half of square 515, in the city of Washington, and having erected a market building thereon, offered at public auction leases for ninety-nine (99) years, renewable
19 forever, of the stalls in said market house, at a specified rental, the highest bidder being entitled to his option of the stalls.

3. At said sale the defendant, John R. Kelly, became the highest bidder for the stand or stall No. 208 in said market building, and executed and delivered to the plaintiff the promissory notes described in the first twenty counts of the declaration, in part payment of the purchase-money for the option of said stall.

4. Thereafter said plaintiff and defendant executed a lease of said stall in the words and figures following:

"This indenture, made this first day of January, in the year of our Lord eighteen hundred and seventy-five, by and between the 'Northern Liberty Market Company,' of Washington, D. C., hereinafter called the lessor, of the first part, and John R. Kelly, hereinafter called the lessee, of the second part, witnesseth:

"That the lessor, in consideration of the payment of the money and annual rent, and the performance of the covenants here-
20 inafter mentioned, reserved and contained on the part of the lessee to be paid and performed, hath granted, demised, and

to farm letten, and doth hereby grant, demise, and to farm let unto the said lessee the *stand or stall No.* two hundred and eight in the market building owned by said lessor, and located upon square numbered five hundred and fifteen (515), as known upon the public plats of the city of Washington, the said stand or stall to be used only for the purpose of vending and trading in fresh meat.

"*To have and to hold* the said stand or stall No. 208, for the use aforesaid, unto the said lessee, from the first day of January, A. D. 1875, for and during and until the full end and term of ninety-nine years, renewal forever, from thence next ensuing, fully to be complete and ending, yielding, and paying therefor to the said lessor, *firstly*, the sum of thirty-three hundred and fifty dollars in the following manner, to wit: One hundred dollars in cash on the delivery of these presents, the residue in nineteen equal half-yearly
21 payments, the first one to mature and be payable on the first day of May, 1875, and the next on the first day of November, 1875, and so on respectively on the first day of each succeeding May and November, until the whole are paid, with interest upon each of said deferred payments at the rate of eight (8) per centum per annum until paid; secondly, the annual rent or sum of one hundred and twenty dollars, payable in equal monthly payments of ten dollars each, on the first day of each and every month during the term hereby demised: *Provided always*, and these presents are on these express conditions, namely, that if it shall happen that any of the aforesaid sums of money or any of the said rent shall be in arrears and unpaid, in all or in part, by the space of three days next after the same or either of them shall have become due and payable; or if the said lessee shall use the said stand or stall for any other purpose than that hereinbefore specified; or if the said lessee shall assign or transfer this lease and term without the consent
22 thereto of the said lessor in writing first had and obtained; or if the said lessee shall make any alterations or additions in or to said stand or stall without the consent thereto of the said lessor in writing first had and obtained; or if the said lessee shall not in all things observe and conform to such rules and regulations concerning the said market building and its occupation, which are now and which from time to time hereafter may be made and prescribed for the government and conduct of said market by the lessor, that then and in either of such cases it shall be the right of the said lessor to re-enter, have again, and repossess the said stand or stall, and all persons and things thereof and therefrom utterly to expel, put out, and remove, using such force therein as may be necessary, said persosns to be deemed as trespassers and dealt with as such, (all and every demand for rent, notice of re-entry, and all other formality in this connection being hereby expressly waived,) and all payments which shall then have been made by said lessee, as
23 well as all improvements and additions to said stand or stall, shall be and remain the property of the lessor, without any right of recovery thereof to the said lessee, and thereafter this lease and every matter herein contained shall cease and determine, and thenceforth be void and of no effect.

"And the said lessee hereby covenants, promises, and agrees to and with the said lessor as follows: To well and truly pay the sums of money and the annual rent hereinbefore mentioned and reserved at the times and in the sums and manner hereinbefore stipulated for the payment thereof; that the said stand or stall hereby demised shall be used only for the purpose or business of trading in fresh meat; that no assignment or transfer of the present demise or term, and no alterations or additions in and to said stand or stall, and neither of them, shall be made without the consent thereto of the lessor in writing first had and obtained; that all rules and regulations concerning said market building, which are now,
24 and which from time to time hereafter may be, made and prescribed for the government and conduct of said market by the said lessor, shall be faithfully observed and conformed to by said lessee, and all other persons lawfully in and about said stand or stall, and that in default of any of said payments, or upon the non-performance of any of the foregoing covenants, all the rights and privileges of said lessee hereunder shall cease and determine, and the said lessee may be expelled as any other trespasser might be out of and from said stand or stall, the said lessee hereby waiving all demands, notices, and other formalities, which might otherwise be deemed necessary to this end.

"It is mutually understood and agreed, that in the construction hereof, the word 'lessor' shall be read so as to include 'its successors and assigns,' and the word 'lessee' shall be read so as to include 'the executors, administrators, and assigns' of said lessee.

"In testimony," &c.

And said defendant took possession of said stall under said
25 lease and has ever since retained the same.

5. Prior to said sale, to wit, on the 18th day of May, 1884, said plaintiff executed a deed of trust on its said property, recorded in liber —, folio —, of the land records of the District of Columbia, to secure bonds of the company to the amount of $100,000, which said deed of trust thereafter, to wit, on the 18th day of May, 1875, was released, and a new deed of trust, dated the said 18th day of May, 1875, recorded in liber —, folio —, of said land records was executed by said company to secure its bonds to the amount of $150,000. Thereafter, to wit, on the 29th day of January, 1880, by a consent decree in equity cause No. 7095, in the supreme court of the District of Columbia, to which cause the plaintiff, all the holders of the bonds of said company, and certain stall holders (sued on behalf of themselves and all other stall holders) were parties, it was decreed that any sale under the said last-mentioned deed of trust should be subject to the rights of all purchasers of stalls in the market building of said company who should pay the pur-
26 chase price of their stalls, receive leases therefor, and pay their stall rentals as in said leases provided.

6. Thereafter, to wit, on the 5th of August, 1881, the defendant, with full knowledge of all the foregoing facts, including the fact that by the terms of its incorporation the corporate existence of the plaintiff was limited to twenty years, executed and delivered to the

plaintiffs the promissory note described in the 21st count of the declaration in compromise of the promissory notes described in the first twenty counts of said declaration, upon express agreement that if said note of August 5th, 1881, was not promptly paid at maturity the plaintiff might surrender the said notes to the defendant, and its cause of action upon the original notes described in the first twenty counts of the declaration should thereupon immediately revive. The said note of August 5th, 1881, remains unpaid, and is still held by the plaintiff.

7. The note described in the 22d count of the declaration was executed and delivered to the plaintiff by one William S.
27 Crown upon the same consideration, and under the same circumstances, as the note described in the 21st count of the declaration as set forth in above paragraph 6; and the defendant, with full knowledge of all the facts hereinbefore stated, for and in consideration of the surrender of two of his notes similar in amount and consideration to those described in the first twenty counts of the declaration, guaranteed payment thereof, but the said note remains wholly unpaid, and the plaintiff is the holder thereof.

8. The notes of January 1st, 1875, described in the first twenty counts of the declaration, in like manner remain unpaid, except as shown in paragraph six above, and are held by the plaintiff.

JAS. G. PAYN-,
Att'y for Def't.

J. J. DARLINGTON,
R. T. MERRICK,
Attorneys for Plaintiff.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and
28 for said District, commencing the fourth Monday, it being the 28th day of January, A. D. 1884.

MONDAY, *January 28th, A. D.* 1884.

By order of Alexander B. Hagner, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

SATURDAY, *April 19th, A. D.* 1884.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

THE NORTHERN LIBERTY MARKET COMPANY,
Pl'ff,
vs.
JOHN R. KELLY, Def't.
} At Law. No. 25224.

Now comes here as well the plaintiff, by its attorney, Mr. Darlington, as the defendant, by his attorney, Mr. Payne, and by consent of the court, submit this case for the opinion of the court upon an agreed statement of facts or special case, and the same

having been heard and argued by counsel, the court is of
29 opinion that from said statement of facts the plaintiff is not entitled to recover. Therefore it is considered that the plaintiff take nothing by its suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of his defence, taxed at $22.50, and have execution thereof. Appeal prayed by plaintiff.

Proceedings before the supreme court of the District of Columbia, in general term, commencing on the fourth Monday, 28th day of April, A. D., 1884, present Chief Justice Cartter, and Justices MacArthur and James.

THURSDAY, *June 5th*, 1884.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter and Justices Cox and James.

THE NORTHERN LIBERTY MARKET COMPANY, Pl'ff,
vs.
JOHN R. KELLY, Def't. } At law. No. 25224.

Now come the parties by their respective attorneys, where-
30 upon, because it appears to the court here that there is no error in the record and proceedings, or in the judgment of the special term in this cause; therefore, it is considered by the court here that the said judgment of the special term be, and it is hereby, affirmed with costs, to be taxed by the clerk, and that the defendant have execution thereof.

31 In the Supreme Court of the District of Columbia, the 29th day of May, 1884.

THE NORTHERN LIBERTY MARKET COMPANY
vs.
JOHN R. KELLY. } No. 25224. In error.

Know all men by these presents, that we, The Northern Liberty Market Company, as principal, and Theodore Barnes are bound unto the above-named John R. Kelly in the sum of two hundred and fifty dollars, to be paid to the said John R. Kelly, his executors or administrators. To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 29th day of May, 1884.

Whereas the above-named The Northern Liberty Market Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named The Northern Liberty Market Company shall prosecute its said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be

void; otherwise, the same shall be and remain in full force and virtue.

THEODORE BARNES, *President.* [SEAL.]
H. P. HOWARD, *Secretary.*
THEODORE BARNES. [SEAL.]

Sealed and delivered in presence of—

Approved by the court.

D. K. CARTTER, *Chief Justice.*

I consent to the approval of this bond.

JAMES G. PAYNE,
Att'y for Defendant.

May 29th, 1884.

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between The Northern Liberty Market Company, plaintiff, and John R. Kelly, defendant, being No. 25224 at law, a manifest error hath happened, to the great damage of the said plaintiff as by its complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 5th day of June, in the year of our Lord 1884, and of the Independence of the United States the one hundred and eighth.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To John R. Kelly:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The Northern Liberty Market Company is plaintiff and you are defendant, to show cause, if any there be, why the judgment

in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Chief Justice.

Service accepted this 5th day of June, 1884.

JAS. G. PAYNE,
Att'y for Def't in Error.

33 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court, this 24th day of June, 1884.

[SEAL.]

R. J. MEIGS, *Clerk,*
By J. JAY CAMP,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal, this 24th day of June, 1884.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 24th day of June, 1884.

[SEAL.]

R. J. MEIGS, *Clerk,*
By J. JAY CAMP,
Assistant Clerk.

Endorsed on cover: District of Columbia supreme court. No. 873. The Northern Liberty Market Company, Plaintiff in Error, *vs.* John R. Kelly. Filed July 2, 1884.

113-199

Supreme Court of the United States.

October Term, 1884.

No. 873.

THE NORTHERN LIBERTY MARKET COMPANY,
Plaintiffs in Error,

vs.

JOHN R. KELLY.

In Error to the Supreme Court of the District of Columbia.

MOTION FOR RE-HEARING.

The plaintiff in error moves the Court for a re-hearing in the above entitled cause, and assigns the following reasons for said motion:

(1.) In order that there may be an adjudication on the question of the validity of the original contract of purchase and lease by and between the plaintiff and the defendant, which said question is directly involved in the issues made up in the case, and presented by the record.

(2.) Said original contract is one of a number of similar contracts, aggregating in amount $180,000.00, only a small proportion of which, comparatively, will be definitively set at rest by a decision confined to the validity of the compromise notes.

(3.) An adjudication upon the validity of said original contract, which is directly presented in the record of this case, will relieve the plaintiff, other stall-holders, and the Courts, from a multiplicity of suits.

(4.) the future operation and success of the plaintiff company, representing an invested capital of more than a quarter of a million of dollars, would be greatly embarrassed by a continuation of

uncertainty as to the validity of its leases until another suit, upon the original notes alone, could be brought to this Court for determination.

(5.) It is of great importance to the defendant and numerous other stall-holders of the plaintiff Company, to be definitely and certainly advised as to the validity of the leases for which they are required to pay.

Respectfully submitted,

R. T. MERRICK,

J. J. DARLINGTON,

Attorneys for Plaintiffs in Error.

On behalf of the defendant in error, I respectfully submit that it is of very great importance to him to have the question of his title under the lease from the plaintiff settled by the Court.

I therefore unite in the foregoing motion, and propose to submit the matter to the consideration of the Court without further argument on behalf of the defendant in error.

JAS. G. PAYNE,

February 2, 1885. *For Defendant in Error.*

113-199

FILED
JAN 5 1885
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 873.

THE NORTHERN LIBERTY MARKET COMPANY
PLAINTIFF IN ERROR,

vs.

JOHN R. KELLY.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR PLAINTIFF IN ERROR.

R. T. MERRICK,
J. J. DARLINGTON,
Attorneys for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

uncertainty as to the validity of its leases until another suit, upon the original notes alone, could be brought to this Court for determination.

(5.) It is of great importance to the defendant and numerous other stall-holders of the plaintiff Company, to be definitely and certainly advised as to the validity of the leases for which they are required to pay.

Respectfully submitted,

R. T. MERRICK,

J. J. DARLINGTON,

Attorneys for Plaintiffs in Error.

On behalf of the defendant in error, I respectfully submit that it is of very great importance to him to have the question of his title under the lease from the plaintiff settled by the Court.

I therefore unite in the foregoing motion, and propose to submit the matter to the consideration of the Court without further argument on behalf of the defendant in error.

JAS. G. PAYNE,

February 2, 1885. *For Defendant in Error.*

113-199

JAN 5 1885

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 873.

THE NORTHERN LIBERTY MARKET COMPANY
PLAINTIFF IN ERROR,

vs.

JOHN R. KELLY.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR PLAINTIFF IN ERROR.

R. T. MERRICK,
J. J. DARLINGTON,
Attorneys for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 873.

THE NORTHERN LIBERTY MARKET COMPANY,
PLAINTIFF IN ERROR,

vs.

JOHN R. KELLY.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF CASE.

The plaintiff in error, The Northern Liberty Market Company, which was also plaintiff below, is a body corporate in the District of Columbia under the General Incorporation Act passed by Congress for the District. (Revised Statutes of the United States for the District of Columbia, Secs. 553 to 593.) Section 554 of this act provides as follows:

"When the certificate shall have been filed in accordance with the provisions of the preceding section, (553,) the persons who shall have signed and acknowledged the same, and their successors, shall be a body politic and corporate in

fact and in name by the name stated in such certificate, and by that name have succession, and be capable of suing and being sued in any court of law or equity in the District; and they and their successors may have a common seal, and make and alter the same at pleasure; and they shall, by their corporate name, be capable in law *of purchasing, holding, and conveying any real or personal estate whatever, which may be necessary to enable the company to carry on its operations named in the certificate;* but shall not mortgage such estate, or give any lien thereon, except in pursuance of a vote of the stockholders of the company."

The certificate provided for a corporate existence of twenty years, the longest term allowed by the act, (Sec. 553,) and recited that the company was formed for the purpose of erecting a market-house in the city of Washington and carrying on a marketing business therein.

The company, so incorporated, purchased in fee simple the west half of square No. 515, in the city of Washington, erected a market-house thereon with numerous stands or stalls, and for the purpose of carrying on its corporate operations sold these stalls on leases for 99 years, renewable forever.

The defendant, John R. Kelly, having received at public auction the privilege of taking stall No. 208 in the market building, received a lease thereof from the company for the specified term of 99 years, renewable forever; and in and by the lease agreed and bound himself to pay for the use and occupation by him of the stall an aggregated sum of $3,350 in semi-annual payments, evidenced by promissory notes, of which twenty (20) have become due and payable; and he bound himself also to pay a certain monthly rent for the premises, (Record, pages 7 and 8.)

Under this lease the defendant took possession of the stall, and occupies it to the present day; but he refuses to pay the notes on the pretense that the company had no power to make any lease to extend beyond the term of its corporate

existence of twenty years. The company brings this suit to enforce the payment of the notes.

It should be added that before the execution of the lease the company had given a mortgage upon the whole property, executed in due form of law, to secure its bonded indebtedness; and that after the execution of the lease this mortgage was released, a new mortgage given subject to the lease to secure a somewhat different indebtedness, and a record agreement entered into by all the parties in interest that the rights of the mortgagees should be subordinate to the rights of the stall-holders, (Record, p. 9.)

Some of the stall-holders, in consequence of hard times fell into arrears. Then to excuse themselves they mooted the question of the power of the company to make these leases. Thereupon, after negotiation, a compromise was effected between the company and the stall-holders, by which a portion of the arrears was remitted and new notes given for smaller amounts with the condition that if these notes should not be paid at maturity the original indebtedness should be revived. Under this compromise the defendant, Kelly, gave the note for $1,881.60, which is sued on in the 21st count of the plaintiff's declaration, the preceding 20 counts being for the 20 original notes hereinbefore mentioned.

The 22d count of the plaintiff's declaration is for another similar note given by another person and guaranteed by the plaintiff, and is based upon the guaranty.

Of course recovery is sought only on either the original contract or the compromise, not on both. The original contract being revived by the failure of the defendant to pay the compromise note, justifies the plaintiff in declaring upon it.

The defence, as already indicated, is the alleged want of power in the company to execute the lease. This defence the court below sustained, and gave judgment for the defendant. The plaintiff thereupon sued out a writ of error.

II.

ASSIGNMENT OF ERRORS.

The court below erred in the following particulars, among others:

1. In holding that a corporation, limited in the duration of its corporate existence to a term of twenty years, but entitled by law to take, hold, and convey any real or personal estate whatever that may be necessary for its purposes, can not make a valid lease for a term longer than its own existence, of real estate which it holds in fee-simple.

2. In holding that a corporation, limited in the term of its duration, cannot sufficiently secure to a lessee the performance of the covenants of a lease extending beyond that term.

3. In holding that the plaintiff, under its charter, in this case was restricted to the conducting of a marketing business, by itself or its immediate agents, and could not lease its stalls for any such purpose.

4. In holding that the promissory notes in suit were all void as for a total failure of consideration, and made no distinction between a total and a partial failure of consideration.

5. In holding that the compromise of a disputed claim is no valid consideration for a new agreement between the parties.

6. In holding that in a suit for the rent or consideration specified in a lease to be paid by the lessee, the latter is not estopped from denying the lessor's title or his right to make the lease.

7. In holding that a lessee may continue to hold posses-

sion of the demised premises, and yet contest the right and title of the lessor.

8. In holding that the plaintiff was not entitled to recover anything whatever.

III.

BRIEF OF ARGUMENT.

1.

The main question in this case is, whether a corporation, limited in the duration of its existence to a term of years, but entitled to hold and dispose of lands in fee-simple and to hold and dispose of any estate whatever, real or personal, can execute a lease for a term of years longer than the term of corporate existence.

It would seem that, in reason, there ought to be no difficulty in answering this question in the affirmative. The greater includes the less. A leasehold interest for any number of years whatever is less than an estate in fee simple. Why a corporation that may create a fee simple in another party may not likewise create in him the lesser leasehold interest is not at all apparent. The court below was evidently led into error by a confusion of two very different things—extent of interest and duration of enjoyment. The latter is necessarily limited in almost all cases, and even in the case of corporations which, theoretically, may be perpetual, yet, practically, are never so, and are always liable to be brought to an untimely end by forfeiture or dissolution in some of its forms. But the former, *extent of interest*, may be limited or unlimited, without any reference to the duration of its enjoyment by the holder of it. The duration of the life of a grantor or grantee is not, except, of course, in the case of life estates specifically limited, the measure of the interest in lands which he may take or give.

At common law a corporation, like an individual, could

take, hold, and transmit any property, whether real or personal, and any estate or interest whatever in property.

1 Blackstone's Com., p. 478.

2 Kent's Com., p. 227.

This right is now generally limited by statute; and there are two limitations in the General Incorporation Act already cited: the one that the property which the company may take or convey shall be such as "may be necessary to enable the company to carry on its operations," and the other that liens and mortgages should not be created except in pursuance of a vote of the stockholders. Within these limitations the statute specifically re-enacts the provisions of the common law, that the company shall "*be capable in law of purchasing, holding, and conveying any real or personal estate whatever.*" Now, does not this statute specifically authorize the company to convey *any estate whatever*, either in realty or personalty? And if it does, where is the justification for saying that it shall not do so, and that it shall convey only such estates as can be fully and completely enjoyed within the period of twenty years? This would be simply to nullify the statute and to paralyze the operations of the companies intended to be organized under it.

In Cruise's Digest (vol. 4, p. 65, sec. 25) it is said: "All natural persons who are capable of alienating their property, or of entering into contracts respecting it, and *all lay corporations, may make leases, which will endure as long as their* INTEREST *in the thing leased*, but no longer."

The extent of *interest*, it will be noticed, and not the duration of enjoyment, is made the criterion of the extent of the power to create leases.

Blackstone says (Com., vol. 2, p. 318): "By the common law, as it has stood for many centuries, all persons seized of any estate might let leases to endure *so long as their own interest lasted*, but no longer. Therefore, a tenant in fee simple might let leases for any duration; for he hath the whole interest.

But tenant in tail, or tenant for life, could make no leases which should bind the issue in tail or reversioner. * * * Corporations aggregate might make what estates they pleased."

In the case of the White Water Valley Company *vs.* Vallette (21 Howard, 424), this Court said: "It is well settled that a corporation, without special authority, may dispose of lands, goods, and chattels, *or of any interest in the same*, as it deems expedient."

In the case of Newark *vs.* Elliott (5 Ohio State, 113) and Reynolds *vs.* Stark County (5 Ohio, 204), it is held that "a corporation may dispose of any property which it has a right to acquire; and when a corporation is authorized to dispose of its property it may dispose of any interest in the same which it may deem expedient, having the same power in this respect as an individual."

Will it be maintained that this company might not have validly taken to itself a lease for ninety-nine years, renewable forever? That precise point, or something like it, was involved in the case of Nicoll *vs.* Erie R. R. Co. (12 N. Y., 121), in which the court of appeals of New York said:

"It was never yet held that a grant of a fee in express terms could be restricted by the fact that the grantee had but a limited term of existence. If it was so a grant could never be made to an individual in fee, because in his earthly existence he is not immortal. Under such a rule a man could never buy a greater interest in a farm than a life estate. It would follow that all estates would be life estates, except those held by perpetual corporations. The intent of parties, fully expressed in a deed, would avail nothing; but all grants would be measured by the mortality of the grantee. It is needless to follow out the proposition further to show its absurdity. *It is not to the parties to the grant, but to its terms, that we look to ascertain the character and extent of the estate granted.*"

In that case an estate in fee simple had been granted to a

corporation limited in the term of its existence to fifty years, and the court unanimously sustained the grant.

Now, both by the common law and the very terms of the special statute governing this case, whatever a corporation may take it may convey. "The right of a corporation to sell its property is absolute, and is not limited as to objects, circumstances, *or interest.*" (Treadwell *vs.* Salisbury, &c., Co., 7 Gray, 404.)

The same rule is laid down in numerous other cases, and without a dissenting authority anywhere, the only limitation being such as is imposed by statutory enactment.

Rives *vs.* Dudley, 3 Jones' Eq., 126.
People *vs.* Mauran, 5 Denio, 401.
Jackson *vs.* Brown, 5 Wendell, 590.
Barry *vs.* Exchange Co., 1 Sandford Ch., 280.
Brigham *vs.* Weiderwax, 1 N. Y., 509.
Burton's Appeal, 57 Penn., 213.
Binney's Case, 2 Bland, 142.
Angell & Ames on Corporations, Sec. 127.
Lea *vs.* Hernandez, 10 Texas, 137.
Crozier *vs.* Crozier, 2 Drury & Warren, 365, 367.
Weekler *vs.* Bank, 42 Md., 582.
Littlevort *vs.* Davis, 50 Miss., 404.
Broom's Legal Maxims.

In the last cited authority it is said that "a tenant in fee may create out of the fee any less estate or interest."

In the case of Lea *vs.* Hernandez (10 Texas, 137), above cited, a municipal corporation had leased lands to the plaintiff and was thereafter dissolved. The court held the lease by its terms to have been merely a tenancy at will, but it added: "Had the corporation alienated the land previous to its dissolution that event would not have divested the title of the vendee, *or had the lease been for a period certain and not merely at will, the right of the lessee to his full term would not, I apprehend, have been affected.* But the present being mani-

festly a mere tenancy at will, was determined by the dissolution of the corporation which created it, and there was an end of the rights of the plaintiff under the lease."

Both upon principle, therefore, and upon authority, it is plain that the power of a corporation over the disposal of its property is not limited by the fact that its existence is for a term and not in perpetuity, or that it may possibly for some cause or other be dissolved; but that the extent of such power is to be measured, as in the case of individuals, by the extent of its title and interest in the property.

2.

But it is argued that, by dedicating property in this case, for market purposes practically forever, the company practically perpetuated its existence beyond the limitations of the law; and that, therefore, the lease was void as against public policy.

This proposition is utterly untenable. The perpetuation of corporate existence is one thing; the impression of a character upon property is another and a very different thing. There is no connection whatever between the two things.

3.

Again, it is argued that the contract in this case was void, because it was beyond the power of the corporation to secure the performance of the covenants of the lease beyond the term of its own existence.

There is but one express covenant in the lease agreed to be performed and kept by the lessor—the renewal of the lease for successive terms of 99 years forever. And to this perhaps may be added the implied covenant for quiet enjoyment. But these two covenants are plainly such as run with the land, and bind the land in the hands of any and all holders thereof; and therefore the continued personal existence of the lessor is not required to secure their performance.

The statute of 32 Henry VIII., chap. 34, sec. 2, which is in force in the District of Columbia (see Alexander's British Statutes in force in Maryland, p. 335), is specific upon this point. It says:

"All * * * lessees and grantees of * * * lands, tenements, * * * * or any hereditament for term of years, life or lives, their executors, administrators, and assigns, shall and may have like action, advantage and remedy against all and every person and persons, and body politics, their heirs, successors, and assigns, which have or shall have any gift or grant of the king, * * * or of any other person or persons, of the reversion of the same manors, lands, tenements, and other hereditaments so letten, or any parcel thereof, for any condition, covenant, or agreement contained or expressed in the indentures of their * * * leases, as the same lessees or any of them might and should have had against the said lessors and grantors, their heirs and successors."

Ever since the passage of this act, and even at common law before it, according to some authorities, covenants for renewal of lease, covenants for quiet enjoyment, and the like, have uniformly been held to run with the land and to bind the reversion into whosoever hands it may come.

Rawle on Covenants for Title, Chap. 8, page 333, and cases there cited.

Smith's Leading Cases, vol. I, part I, p. 115, (Spencer's Case,) where the whole subject is exhaustively treated.

Other answers to this objection are apparent. Among them are the following:

1. The defendant made his purchase with his eyes open, and there is no reason why the rule of *caveat emptor* should not apply to him. "A purchaser of lands from an incorporated company is chargeable with notice of all the restrictions upon the power to hold and convey lands contained in its charter."

Merritt *vs.* Lambert, 1 Hoff. Ch., 166.

2. This ground of defence is substantially reducible to the statement that, twenty years hence, certain covenants may be broken, and there may, therefore, be a partial failure of consideration. Now, even it were *certain* that these covenants would be broken after twenty years, and there should, therefore, be a partial failure of consideration, the utmost that could be claimed under any circumstances would be merely a reduction of damages. But it is well settled that "if there were a substantial consideration left, although much diminished, it would still suffice to sustain the contract."

Parsons on Contracts, vol. 1, p. 386.

It is a new doctrine, that, because a covenant may, by some possibility, be broken hereafter, therefore there can now be no recovery for rent under a lease containing such a covenant.

3. If these covenants were merely personal covenants, and did not run with the land, is not the security here at least as good as where a natural person gives a similar lease, and covenants that his personal representatives shall renew it. We can readily imagine the value of such a covenant in the latter case.

A section (676) of the same General Incorporation Act, under which the plaintiff is incorporated, covers this precise point: "Nor shall the dissolution of any company formed under this chapter take away or impair any remedy given against any such corporation, its stockholders, or officers for any liability which shall have been previously incurred.

So far as liabilities, therefore, are concerned, the act of incorporation here prolongs and perpetuates the company until all such liabilities are discharged.

We would also refer in this connection to—

Dillon on Municipal Corporations, sec. 113.

Piggott *vs.* Maison, 1 Paige, 412.

Blackmore *vs.* Boardman, 28 Mo., 420.

Main *vs.* Green, 32 Barb., 448.
Shelburne *vs.* Biddulph, P. C., 363.
Crease *vs.* Babcock, 23 Pick, 334.

4.

The next proposition of the defense, that the plaintiff, by its charter and the act of incorporation, is limited to the transaction of a marketing business by itself or its immediate agents, and that it has no power to lease its stalls to other persons for that purpose is as destitute of foundation in reason or authority as the previous propositions.

The certificate of incorporation defined the objects of the company to be "the erecting of suitable buildings for marketing purposes, and for sale of marketable provisions therein."

The proposition of the defense presupposes that this sentence is to be grammatically construed so as to read that one of the objects of the corporation is "the sale of marketable provisions," and not the erection of buildings, merely for that and other marketing purposes. This is too petty and trivial a construction of the words of the certificate to merit judicial consideration. And even if it were a just construction, the consequences sought to be deduced by the defense would not at all follow.

"The rule that corporations can exercise no powers not delegated, should not, from an indiscriminating timidity or apprehension, be extended so as to unwisely and unnecessarily cripple and restrict them, as to the means of executing the powers that are delegated."

Clark *vs.* Farrington, 11 Wis., 306.

If the means adopted are convenient and well adapted to the objects to be accomplished, they may be employed, though neither absolutely necessary nor usual.

Madison, &c., Co. *vs.* Watertown, &c., Co., 5 Wisc., 181.
Barry *vs.* Exchange Co., 1 Sandf. Ch., 280.
McCullough *vs.* Maryland, 4 Wheaton, 316.
Green's Brice's Ultra Vires, chap. 3, sec. 1, and the cases there cited.

"The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."

Railway Co. *vs.* McCarthy, 96 U. S., 267.

"Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose."

National Bank *vs.* Matthews, 98 U. S., 628, and cases there cited.

"If a bank or other corporation makes a contract with individuals which it is prohibited from making by, or which is contrary to, and in violation of, its charter, the contract is not thereby void as between the corporation and the other parties. Nor can they set up in their defense, when sued upon the contract, a want of power in the bank to make it. Such defense involves the question of violation of charter, and into that the State alone can inquire, and alone can punish it."

Grand Gulf Bank *vs.* Archer, 8 Smedes & M., 151.

There is no analogy between this case and those cases in which railroad companies have been held to have exceeded their powers by disposing of their property and franchises, so as to deprive themselves of the power thereafter of performing their corporate functions. Here, instead of being restricted from conveying their property, companies organized like the plaintiff are specifically authorized by the statute to convey any property or estate which they may take for their corporate purposes.

5.

Subsequently to the making of the lease in this case, the lessees of the stalls in the plaintiff's market-house, including the defendant, having become somewhat embarrassed through depreciation in values, and the right of the plaintiff to make these leases having then become a mooted question,

the parties came together, and in consideration of the circumstances agreed upon a compromise, by which the rent was reduced, and new notes given by the lessees. The defendant, in pursuance of this compromise, executed and delivered the promissory note declared on in the 21st count of the plaintiff's declaration.

The decision of the court below holds this most solemn compromise to be a nullity, upon the ground apparently that the original lease being, in its opinion, *ultra vires* and void, there could be no compromise or adjustment of rights under it.

This doctrine is simply revolutionary, and contrary to all principle. Disputed liabilities may in all cases be adjusted by the parties themselves, and their adjustments will be sustained where there is no fraud or undue advantage. And it has never yet been held before this that a disputed liability may not be compromised, whether the dispute is over matters of fact or over the legal effect of conceded facts. (See Parsons on Contracts, vol. 2, p. 194.)

6.

There remains a final consideration, which, although a technical one, ought to dispose of this controversy.

Here a lessee, who remains in possession and claims all the benefits of the demised premises, refuses to pay the stipulated rent, and contests the landlord's title. He seeks to remain in possession, and yet to be relieved from his obligation to pay the agreed consideration for that possession.

This is not a condition of things which should commend itself to any court either of common law or of equity. And the defendant's position is so contrary to elementary principles of law, that, even with the decision of the lower court overruling those principles, the plaintiff does not deem it necessary, or even proper, to refer to any authorities.

From the lease itself, (Record, p. 8,) it will be seen that

the consideration to be paid by the lessee for the use and occupation of the stall in question was twofold: 1st. The notes in suit which were to be paid semi-annually; and 2d. A further monthly rent, payable in each and every month. In other words, the rent of the stall was divided into two parts,—one to be paid wholly within nine years, in semi-annual instalments, and the other to be paid in monthly instalments and to run during the entire term of the lease. In a suit upon the latter, could the lessee be allowed to defend on the ground that the lessor had no title? Unquestionably not, unless we now overturn a rule of law that is as old as the common law itself, and that has never been questioned in any common law tribunal. And if the lessor's title could not be questioned in such a suit as that, is not the lessee equally estopped in a suit against him for the other part of the rent? There is no difference or distinction whatever between the two.

7.

We submit, therefore, these plain propositions of law as applicable to the present case:

1st. That a corporation entitled by law to take, hold, and convey any real or personal estate whatever for its uses, but limited in the term of its corporate existence to a period of twenty years, can make valid leases of such real estate for a term of years beyond the term of corporate existence, and renewable forever.

2d. That covenants for renewal of such leases, and covenants for quiet enjoyment, are covenants that run with the land; and a corporation, limited in duration of existence, as hereinbefore stated, may validly enter into such covenants, although no breach may occur during the term of corporate existence.

3d. That the plaintiff by its charter was not restricted to the carrying on of a market business on its own account.

4th. That, at the utmost, there could have been only a partial failure of consideration in this case; that even in the event of such partial failure there was a substantial consideration left sufficient to support the contract; and that even the partial failure could not be availed of until the contingency occurred.

5th. That, even if the original contract were void as being *ultra vires*, the parties are bound by their subsequent compromise.

6th. That the defendant is estopped from contesting his lessor's title or its power to make the lease in question.

7th. That, under each and all of these propositions, the judgment should have been for the plaintiff for the amount of his claim.

As, by the terms of the compromise, upon the defendant's failure to pay the compromise note, the original notes were revived, judgment should be entered for the whole twenty notes, amounting in all to the sum of $3,421.53, with interest thereon from January 1, 1875, and for the guaranteed Crown note of $394.08, with interest thereon from November 11, 1881, being in all $3,815.61, with interest as aforesaid.

We submit that the judgment of the court below should be reversed; and, as all the facts are before this court, that judgment should be entered here for the full amount of the plaintiff's claim. It is not necessary that the case should be sent back to have judgment entered, though that also may be done.

R. T. Merrick,
J. J. Darlington,
Attorneys for Plaintiff in Error.

113-199

Office Supreme Court U. S.
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JAN 5 1885
JAMES H. McKENNEY,
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1884.

No. 873.

THE NORTHERN LIBERTY MARKET CO.,
Plaintiff in Error.

vs.

JOHN R. KELLY,
Defendant in Error.

In error to the Supreme Court of the District of Columbia.

Brief for Defendant in Error.

The plaintiff has its corporate existence under the general incorporation act in force in the District of Columbia which limits such corporate existence *to twenty years* (from May 4, 1874).

In January, 1875, the plaintiff having acquired a parcel of land and erected a market building thereon, offered for sale at public auction, stalls in the said market house, on leases *for ninety-nine* (99) *years renewable forever*, at a specified rental.

The defendant purchased stall No. 208 subject to a yearly rental of one hundred and twenty dollars, and as part of the purchase money he executed and delivered to the plaintiff

the notes described in the first twenty counts of the declaration, which, for convenience, may be designated "the original notes." (See statement of facts page 7 of record.)

We contend that there is an entire failure of the consideration for which these notes were given.

That consideration was not merely the present use and occupancy of the stall. That was provided for by a current rent payable monthly.

The purchase money, of which these notes formed part, was given for a grant which, upon its face, was of great prospective value, to wit, a term of ninety-nine years, renewable forever.

But the company (plaintiff) had no power to make such a grant.

When the corporate existence terminates, as by the law under which it exists, it must, in 1894, its property belongs to the stockholders who will be entitled to a distribution.

This grant or lease would not be binding upon them.

Nor would it be binding upon any person or corporation succeeding the plaintiff in the maintenance of a market house after the expiration of the twenty years.

In no event could the defendant claim, under the grant to him, any term or estate in the property after the period of statutory limitation.

So it is clear that the defendant did not get and could not get that which he purchased and for which these notes were given.

It may be claimed by the plaintiff that the defendant having entered into possession under this lease and occupied the stall should not now be allowed to maintain this plea.

If this were the case of an executed agreement under which property had been transferred and money paid, the rights of the parties might be concluded.

But this is not such a case.

The undertaking on the part of the plaintiff to convey to the defendant a perpetual term in the property was *ultra vires* and therefore void.

The case of Thomas *vs* the Railroad Co., decided by this court in 1879, and reported in 101 U. S., p. 71–87, covers these points and is sustained by numerous authorities cited in the opinion of the court.

We need cite no authorities to establish the proposition that the failure of consideration is a good defence to these notes.

This suit is between the original parties and the defendant is entitled to the benefit of his plea.

This is not a question of the competency of proof.

The defendant is not offered as a witness to invalidate a negotiable instrument of his own creation.

The defence is made in the pleadings and the agreed statement of facts.

This we contend disposes of the plaintiff's claim as to the original notes (first twenty counts of declaration.)

It may be asserted that the note described in the twenty-first count was given in compromise of the original notes, and therefore as to this note there is a valid, legal consideration.

To this we reply that there was no compromise.

The plaintiff in his replication to the defendants fifth plea, (page 6 of record), distinctly says that this note was given and accepted upon express terms that it "*should not be a settlement or compromise of the said earlier notes, unless it was paid at maturity and that it remains wholly unpaid.*"

And in the agreed statement of facts (paragraph 6, pages 9 and 10 of record), the plaintiff again asserts that this note